

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

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MARJORIE FERRELL, et al.,  
  
Plaintiffs,

v.

WYETH-AYERST LABORATORIES,  
INC., et al.,  
  
Defendants.

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Civil Action No. C-1-01-447

Judge Sandra S. Beckwith  
Magistrate Judge Timothy S. Hogan

**END PAYOR PLAINTIFFS' RESPONSE TO REQUEST TO SUBMIT  
SUPPLEMENTAL AUTHORITY IN CONNECTION WITH WYETH'S PARTIAL  
MOTION TO DISMISS**

In its Request to Submit Supplemental Authority, Wyeth-Ayerst Laboratories, Inc. ("Wyeth") draws the Court's attention to the Ohio intermediate appellate court's split decision concerning the application of *Illinois Brick* to claims under the state's Valentine Act and common law principles of restitution and unjust enrichment. *See Johnson v. Microsoft, Inc.*, -- N.E.2d --, No. C020564, 2003 WL 23022065 (Ohio App. 1 Dist. Dec. 30, 2003). However, this Court is not bound by the decision in *Johnson*, because the Ohio Supreme Court has not yet agreed with the controversial conclusion that claims by indirect purchasers are barred by *Illinois Brick* under state law. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *Stanek v. Greco*, 323 F.3d 476, 478 (6th Cir. 2003) (federal district court only bound on question of state law by decision of state's highest court). Indeed, another judge of this district has recently applied this standard in declining to follow an intermediate state appellate court's interpretations of state law. *See e.g., Sterry v. Safe Auto Ins. Co.*, -- F. Supp. 2d --, 2003 U.S. Dist. LEXIS 17363, \*25 (S.D. Ohio Aug. 25, 2003) (Attached as Exhibit A). For this reason, this Court should decline to follow the *Johnson* majority's decision in considering Wyeth's Partial Motion to Dismiss.

Instead, Plaintiffs respectfully submit that Judge Painter's dissent in *Johnson* correctly interprets Ohio law when it concludes that indirect purchasers have standing to bring suit under

Ohio's Valentine Act. Judge Painter's decision parallels the arguments in Plaintiffs' briefs in opposition to Wyeth's Partial Motion to Dismiss. The broadly written, plain language of Ohio's Valentine Act grants standing to anyone "injured in the person's business or property" by unlawful anti-competitive activity. *See Johnson*, 2003 WL 23022065, at \*8. In addition, Judge Painter notes that the language of Ohio's statute resembles that of other states' statutes that have permitted indirect purchaser antitrust claims even in the absence of an *Illinois Brick* repealer. *See id.* Judge Painter correctly concluded that "what was law prior to *Illinois Brick* should continue to be the law. Ohio should allow indirect-purchaser actions under the Valentine Act." *Id.* If faced with the same question, the Ohio Supreme Court would reach a similar conclusion. Accordingly, because indirect purchaser actions are permitted under the Valentine Act and Ohio common law principles, and for the other reasons set forth in Plaintiffs' opposition to Wyeth's Partial Motion to Dismiss, Wyeth's Partial Motion to Dismiss should be denied.

DATED: March 1, 2004

End Payor Plaintiffs

By: /s/ Kenneth A. Wexler  
One of Their Attorneys

**Counsel for Plaintiffs:**

Janet G. Abaray  
**LOPEZ, HODES, RESTAINO, MILMAN,  
SNIKOS & POLOS**  
312 Walnut Street  
Suite 2090  
Cincinnati, Ohio 45202  
*Co-Liaison Counsel*

Kenneth A. Wexler  
Jennifer Fountain Connolly  
**THE WEXLER FIRM<sup>LLP</sup>**  
One North LaSalle  
Suite 2000  
Chicago, Illinois 60602  
(312) 346-2222  
*Co-Lead Counsel*

Joseph E. Conley, Jr.  
**BUECHEL & CONLEY**  
25 Crestview Hills Mall Road  
Suite 104  
Crestview Hills, Kentucky 41017  
*Co-Liaison Counsel*

Marc H. Edelson  
**HOFFMAN & EDELSON**  
45 West Court Street  
Doylestown, Pennsylvania 18901  
(215) 230-8043  
*Co-Lead Counsel*

Brian Williams  
**HEINS MILLS & OLSON, P.C.**  
700 Northstar East  
608 Second Avenue South  
Minneapolis, MN 55402  
*Co-Lead Counsel*

Patrick E. Cafferty  
**MILLER FAUCHER and CAFFERTY  
LLP**  
101 N. Main Street, Suite 885  
Ann Arbor, MI 48104  
(734) 769-2144  
*Co-Lead Counsel*

Ira Neil Richards  
**RODRIGUEZ & RICHARDS, LLC**  
The Penthouse  
226 West Ritten House Square  
Philadelphia, PA 19103

Lee Squitieri  
**SQUITIERI & FEARON**  
421 Fifth Avenue  
26<sup>th</sup> Floor  
New York, NY 10175

Andrew B. Spark  
**LAW OFFICE OF ANDREW BENNETT SPARK**  
SouthTrust Bank Plaza-East Tower  
1800 Second Street  
Suite 818  
Sarasota, Florida 34236

Robert C. Gilbert  
**LAW OFFICES OF ROBERT C. GILBERT**  
Commercebank Center  
220 Alhambra Circle, Suite 400  
Coral Gables, Florida 33134  
(305) 529-9100

Anthony Bolognese  
**BOLOGNESE & ASSOCIATES**  
One Penn Center  
1617 JFK Boulevard  
Suite 650  
Philadelphia, PA 19103  
(215) 814-6750

Jonathan Shub  
**SHELLER, LUDWIG & BADEY**  
1528 Walnut St  
3<sup>rd</sup> Floor  
Philadelphia, PA 19102  
(215) 790-7327

Marvin A. Miller  
Jennifer W. Sprengel  
**MILLER FAUCHER and CAFFERTY LLP**  
30 N. LaSalle Street, Suite 3200  
Chicago, IL 60602  
(312) 782-4880

Susan LaCava  
**SUSAN LaCAVA S.C.**  
23 N. Pinckney, Suite 300  
Madison, Wisconsin 53703  
(608) 258-1335

Bernard Persky  
Barbara Hart  
**GOODKIND LABATON RUDOFF & SUCHAROW LLP**  
100 Park Avenue  
New York, New York 10017  
(212) 907-0700

Nicholas E. Chimicles  
James R. Malone, Jr.  
**CHIMICLES & TIKELLIS, LLP**  
361 West Lancaster Avenue  
Haverford, PA 19041  
(610) 642-8500

Douglas G. Thompson  
William Butterfield  
L. Kendall Satterfield  
**FINKELSTEIN, THOMPSON & LOUGHRAN**  
1055 Jefferson Street, NW, Suite 601  
Washington D.C. 20007  
(202) 337-8000

Steven Scholl  
**Dixon, Scholl & Bailey, P.A.**  
707 Broadway, N.E.  
Suite 505  
Albuquerque, NM 87125-6746  
(505) 244-3890

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing pleading was served by First-Class U. S. Mail, postage prepaid and by facsimile, this 1st day of March, 2004, on the following:

William J. Baer, Esq.  
David S. Eggert, Esq.  
ARNOLD & PORTER, LLP  
555 Twelfth Street, NW  
Washington, DC 20004-1206

Dan K. Webb, Esq.  
W. Gordon Dobie, Esq.  
WINSTON & STRAWN LLP  
35 West Wacker Drive  
Chicago, IL 60601-9703

Ruthanne Gordon  
BERGER & MONTAGUE, P.C.  
1622 Locust Street  
Philadelphia, PA 19103

Eliot Long, Esq.  
BUCHANAN INGERSOL  
1835 Market Street, 14<sup>th</sup> Floor  
Philadelphia, PA 19103

James R. Adams, Esq.  
Grant S. Cowan, Esq.  
FROST BROWN TODD LLC  
2200 PNC Center  
201 E. Fifth Street  
Cincinnati, OH 45202-4182

Steve D. Shadowen, Esq.  
Gordon A. Einhorn, Esq.  
HANGLEY ARONCHICK SEGAL &  
PUDLIN  
30 North Third Street, Suite 700  
Harrisburg, PA 17101-1810

Thomas L. Long, Esq.  
BAKER & HOSTETLER LLP  
Capitol Square, Suite 2100  
65 East State Street  
Columbus, OH 43215

/s/Joseph E. Conley, Jr.  
Joseph E. Conley, Jr.